Supreme Court, U.S.
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No._____

IN THE

Supreme Court of the United States

October Term, 1996

C. ELVIN FELTNER, JR.,

Petitioner,

v.

MCA TELEVISION, LTD.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the decision of the Court of Appeals for the Eleventh Circuit that a district court has federal copyright jurisdiction when a party who has contracted to license a copyrighted work and has a contract dispute with the copyright owner continues to display the work, conflicts with decisions of other U.S. Courts of Appeals?

II. Whether it is possible for a party who has licensed a copyrighted work, breached the contract, and continued to display the work to willfully infringe the copyright for purposes of an award of statutory copyright damages, 17 U.S.C. §504(c)(2), when another U.S. Court of Appeals has described the issue of whether such conduct even constitutes infringement as "a complex issue in a 'murky' area?"[1]

III. Whether the decision of the Court of Appeals for the Eleventh Circuit that for purposes of statutory damages under the Copyright Act, 17 U.S.C. §504(c)(1), the episodes of a television series constitute separate works conflicts with decisions of other U.S. Courts of Appeals?

IV. Whether the decision of the Court of Appeals for the Eleventh Circuit which affirmed an award of multiple awards of statutory damages per work infringed conflicts with a decision of another U.S. Court of Appeals?

V. Whether the Court of Appeals for the Eleventh Circuit acted contrary to F.R.C.P. Rule 52(a) and decisions of other Courts of Appeals by not remanding to the District Court to explain the basis of its award of $10,000 Per Intringement?

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[1] *Schoenberg v. Shapolsky Publishing Co.*, 971 F.2d 926, 931 (2d Cir. 1992)

PARTIES TO THE PROCEEDING

C. E. Feltner, Jr. - Defendant/Petitioner
MCA Television, Ltd. - Plaintiff/Respondent
Krypton International Corporation
Krypton Broadcasting Corporation
Krypton Broadcasting of Jacksonville, Inc.
Krypton Broadcasting of Fort Pierce, Inc.
Krypton Broadcasting of Birmingham, Inc.

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C. ELVIN FELTNER, JR.,

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Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

This petition seeks review of the opinion issued by the United States Court of Appeals for the Eleventh Circuit on July 26, 1996 (App. 1a) which appears at 89 F.3d 766, which affirmed the October 18, 1994 oral opinion of the District Court, (App. 17a) the March 2, 1995 Findings of Facts and Conclusions of Law and Omnibus Order (App.32a), and the

March 6, 1995 Order Correcting Findings of Fact and Conclusions of Law. (App. 40a). A timely petition for rehearing with a suggestion of rehearing en banc was filed. It was denied on October 7, 1996. (App.15a).

STATEMENT OF JURISDICTION

In seeking review of the above-referenced decision of the United States Court of Appeals for the Eleventh Circuit and its denial of his Petition for Rehearing with a Suggestion of Rehearing *en banc*, petitioner invokes certiorari jurisdiction conferred on this Court by 28 U.S.C. §1254 (1).

STATUTES INVOLVED

Section 101 of the Copyright Act, 17 U.S.C. §101, provides in relevant part:

* * * * *

> A "collective work" is a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.
>
> A "compilation" is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term "compilation" includes collective works.

* * * * *

Section 504(c) of the Copyright Act, 17 U.S.C. §504(c), provides in relevant part :

(c) Statutory damages. (1) Except as provided by clause (2) of this subsection, the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than $500 or more than $20,000 as the court considers just. For the purposes of this subsection, all the parts of a compilation or derivative work constitute one work.

(2) In a case where the copyright owner sustains the burden of proving and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than $100,000. In a case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court it (sic) its discretion may reduce the award of statutory damages to a sum of not less than $200.

* * * * *

Rule 52(a) of the Federal Rules of Civil Procedure, provides in relevant part :

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specifically and state separately its conclusions of law thereon....

STATEMENT OF CASE

Respondent, MCA Television, Ltd. (MCA), licenses television programs and motion pictures to television stations. Through his wholly owned corporation, Krypton International, petitioner, C. Elvin Feltner, Jr. (Feltner), has for many years operated a large film library and been in the business of licensing the films in that library to television stations. In the early 1990's, Krypton International's subsidiary, Krypton Broadcasting, acquired three television stations - two in Florida and one in Alabama. The two in Florida were burdened by substantial programming debt before Krypton Broadcasting acquired them. As a result, before he caused Krypton Broadcasting to acquire those stations, Feltner and his subordinates contacted MCA and other syndicators to determine whether the licenses then in force at those stations could be restructured. The syndicators, including MCA, orally agreed to restructure but not until after the stations had been purchased. After the stations were purchased, many syndicators, including MCA, refused to restructure on terms which would permit the stations to survive financially.

Feltner tried to operate the stations, but they could not generate sufficient revenues to pay all of the syndicators' license fees - including those of MCA - and eventually the syndicators - including MCA - sent letters to the stations purporting to terminate the licenses. The total amount of program debt to MCA for both shown and unshown material was approximately $500,000.[2] In its termination notices

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[2]The total amount of contract debt then outstanding for the MCA programs that had been used was only a small fraction of this amount.

MCA demanded that the Krypton stations immediately both stop broadcasting the materials and pay the total amount due on the contracts. But, it also told Krypton that if payments were brought up-to-date the licenses would be reinstated. Acting pursuant to Feltner's belief based on 30 years in the licensing business that these letters were only a collection tactic, the Krypton stations continued to broadcast the MCA programs. MCA then sued the Krypton stations. When injunctions were issued, the Krypton stations immediately ceased broadcasting MCA materials.

In May 1993, MCA and other syndicators filed an involuntary bankruptcy petition against the Florida stations. This was later converted to a Chapter XI proceeding involving all three stations. The stations were then sold at auction, and MCA was fully compensated for the outstanding program debt from the proceeds of the bankruptcy sale. MCA has also been awarded copyright statutory damages against the station corporations by the bankruptcy court.

MCA filed this suit against Feltner for vicarious and contributory copyright infringement on November 3, 1993. On September 26, 1994, the parties entered into a joint pretrial stipulation. In the stipulation the parties agreed that there had been 900 *showings* of copyrighted works. No specific number of copyrighted works infringed was mentioned. Among the issues identified as remaining for trial was the amount of damages. (App. 12a)

On August 22, 1994, MCA moved for summary judgment on liability. This motion was denied the Friday before the trial by Judge Davis on the ground that if Feltner could prove the existence of an oral agreement to modify the

preexisting licenses then there would be no infringement. At the beginning of proceedings on the morning of trial and without prior notice, Judge Ryskamp instructed Feltner's counsel that since Judge Davis appeared to have found all of the elements necessary for a finding of infringement and the only element remaining regarding liability was Feltner's oral agreement defense, he would require Feltner to proceed first with that defense. Judge Ryskamp then stated that if he found that infringement had occurred he would then hold a hearing on damages. Feltner's counsel had no notice that such a procedure was going to be imposed.

Feltner and MCA then presented evidence regarding the oral agreement issue. Feltner moved for judgment at the close of evidence on liability in the belief that further evidence would be taken on damages if liability was found by the court. At that point the court informed Feltner's counsel that no further evidence would be taken and that he would issue a decision the next morning. The next morning Judge Ryskamp issued his findings. (App. 17a) He held for MCA on liability; and after expressing his dissatisfaction with the lack of evidence on damages, he found that Feltner had willfully infringed MCA's copyrights. He then awarded statutory damages of $10,000 for each of 900 works ($9,000,000) without any explanation of the basis for the per work amount of the award.[3] When it was pointed out that in fact there were substantially fewer than 900 works involved in the case and that MCA had introduced no evidence of the number of works infringed, Judge Ryskamp remarked that the court of appeals would have to sort this out. Timely motions for a new trial and to alter judgment were filed; both were denied.

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[3]This is the largest reported award of statutory damages under the Copyright Act.

Feltner then appealed to the United States Court of Appeals for the Eleventh Circuit. On appeal Feltner argued that the complaint failed to state a federal cause of action because a person with a contract to exhibit a copyrighted work who notwithstanding a contract dispute with the licensor displays the work in accordance with the terms of the contract cannot be held to have infringed. He also argued that the evidence could not support a finding of willful infringement, that the episodes of the various television series involved did not constitute separate works for purposes of an award of statutory damages under section 504(c)(1) of the Copyright Act, that the district court had failed to make sufficient findings supporting the per work award of statutory damages, and that the district court erred in making more than one award of statutory damages per work infringed.

On July 26, 1996, the Eleventh Circuit affirmed with one judge dissenting in part. (App. 1a) The Court of Appeals held that the complaint stated a federal claim under the Copyright Act. The Eleventh Circuit also upheld the finding of willfulness and held that the episodes of the television series constituted separate works for purposes of statutory damages.[4] Also, by a two-to-one vote, it held that more than one award of statutory damages could be awarded per work infringed in view of the terms of the pretrial stipulation, notwithstanding the statutory bar against such double awards. A timely petition for rehearing with a suggestion of rehearing en banc followed. That petition was denied on October 7, 1996. (App. 15a).

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[4]It did not address the issue of the adequacy of the findings in its opinion.

REASONS FOR GRANTING THE WRIT

I. The decision of the Court of Appeals for the Eleventh Circuit that a district court has federal subject matter copyright jurisdiction when a party who has contracted to license a copyrighted work and has a contract dispute with the copyright owner continues to display the work conflicts with decisions of other U.S. Courts of Appeals.

In the Court of Appeals, Feltner contended that the district court did not have federal subject matter copyright jurisdiction in a case in which a party who has contracted to license a copyrighted work and has a contract dispute with the licensor under the license agreement continues to display the work during the course of the dispute. The Court of Appeals disposed of this issue in three short sentences. It stated:

> Feltner initially asserts that the district court lacked subject matter jurisdiction because this cause did not 'arise under' the Copyright Act. 17 U.S.C. §501 *et seq.* Feltner argues that this case involves a breach of contract claim and that the federal district court therefore did not have jurisdiction. We disagree and find that the court had subject matter jurisdiction over MCA's claim under the Copyright Act.

(App 3a) The Court of Appeals' decision directly conflicts with prior decisions of the Fifth and Second Circuits. In *Fantastic Fakes, Inc. v. Pickwick International, Inc.*, 661 F.2d 479 (5th Cir. 1981), the former Fifth Circuit held that a party with a license to use a copyright who has breached a covenant of the license agreement may not be sued for copyright infringement if he continues to display the work after he has been declared to be in default by the licensor. The Fifth Circuit stated, at 483-484:

> The question emphasized by Pickwick and focused on by the trial court was whether conformance with section 2(b) (of the contract) was a condition of Fantastic's obligations under the licensing agreement or merely a covenant. Both parties agree that if a breach of a condition precedent is found then the authority to manufacture and distribute copyrighted material granted in the licensing agreement did not vest. In that case, Pickwick's actions in manufacturing records and tapes would be without the authority of the copyright owner and would render Pickwick liable for copyright infringement. *See National Comics Publications, Inc. v. Fawcett Publications, Inc.*, 191 F.2d 594 (2d Cir. 1951); *3 Nimmer on Copyright* § 10.15. A mere breach of covenant may support a claim of damages for breach of contract but will not disturb the remaining rights and obligations under the license including the authority to use the copyrighted material.

Similarly, in *Schoenberg v. Shapolsky Publishers, Inc.*, 971 F.2d 926 (2d Cir. 1992), the issue presented was whether district courts have subject matter jurisdiction in cases in which a party who breached a license agreement continued to display the work. The Second Circuit set forth the following standard to be applied by the district courts in that Circuit. The Second Circuit stated, at 932-933:

> ...we instruct courts in this Circuit to undertake a three-part test...to determine whether a complaint states a cause of action arising under the Copyright Act. A district court must first ascertain whether the plaintiff's infringement claim is only 'incidental' to the plaintiff's claim seeking a determination of ownership or contractual rights under the copyright...If it is determined that the claim is not merely incidental, then a district court must next determine whether the complaint alleges a breach of

> a condition to, or a covenant of, the contract licensing or assigning the copyright.... As we noted above, if a breach of a condition is alleged, then the district court has subject matter jurisdiction...But if the complaint merely alleges a breach of a contractual covenant in the agreement that licenses or assigns the copyright, then the court must undertake a third step and analyze whether the breach is so material as to create a right of recission in the grantor. If the breach would create a right of recission, then the asserted claim arises under the Copyright Act. (Citations omitted)

This ruling regarding the standards for determining federal subject matter copyright jurisdiction has been followed by district courts in the Second Circuit and other circuits in many cases: see *e.g.,Baptiste v. Khoury*, 910 F.Supp. 277 (W.D.La. 1996); *USAR Systems, Inc. v. Brain Works, Inc.*, 897 F.Supp. 163, 165-66 (S.D.N.Y. 1995); *Mother Waddles Perpetual Mission, Inc. v. Frazier*, 904 F.Supp. 603, 607-09 (E.D.Mich.1995) (Lanham Act); *Hanna-Barbera Productions v. Screen Gems-EMI Music*, 829 F.Supp. 67, 70-73 (S.D.N.Y. 1993); *Living Music Records v. Moss Music Group*, 827 F.Supp. 974, 979-81 (S.D.N.Y. 1993).[5]

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[5]The leading text in the copyright area, *Nimmer on Copyright*, agrees with the holdings of the Second and Fifth Circuits. Nimmer states, at Vol.3, §10.15:

> If a grantee under an assignment or license uses the work in violation of the provisions of the authorizing instrument, depending upon the nature of such violation the grantor may have an action for breach of contract, or he may have a right to reclaim the rights granted and/or to sue for copyright infringement or he may be able to choose among such alternatives.
>
> If the grantee's improper conduct constitutes a breach of a covenant undertaken by the grantee (as distinguished from his failure to satisfy a condition to his authorization) and if such covenant constitutes an enforceable contractual obligation, then the grantor will have a cause of action for breach of contract.

In this case, MCA claimed that Feltner's stations had breached the contracts. It asserted that the continued broadcast of the programs after MCA sent its unilateral notice of termination but before any judicial finding of breach constituted infringement and the federal court had copyright jurisdiction. The Court of Appeals found that federal jurisdiction existed even though a contract existed and even though MCA successfully pursued its contract remedies in the bankruptcy court.

In reaching this result, there is no question that the court below applied a different standard than that applied by the Second and Fifth Circuits in similar cases. In particular the court below did not determine whether the alleged infringement was incidental to the contract claim, whether there was a breach of a condition rather than a breach of a covenant, and if there was a breach of a covenant whether it was material. *Schoenberg, supra.*

The decision of the Court of Appeals shifts the relative bargaining positions of the parties when there is a contract dispute involving a copyrighted work greatly in favor of the licensor. It permits licensors to both have their copyright cake and eat their contract remedy cake too. There is nothing in the Copyright Act which authorizes such dual relief, and it is unjust for a party, as here, to be able to stand on its contract rights and at the same time double recover for copyright infringement. A licensor's insistence on being paid the

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* * * *

If the nature of a licensee's violation consists of a failure to satisfy a condition of the license (as distinguished from a breach of a covenant), it follows that the rights dependant upon satisfaction of such condition have not been effectively licensed and therefore any use by the licensee is without authority from the licensor and may therefore constitute an infringement of copyright. (Footnotes omitted).

contract price should constitute a waiver of any copyright claims. This is an issue of great importance in the broadcasting and publishing industries which the court below has decided in a cursory manner and contrary to the great weight of authority including decisions of two other Courts of Appeals. This question has been present in many cases involving copyrighted works, *e.g., Paramount Pictures v. Metro Program Network,* 962 F.2d 775 (8th Cir. 1992); *Topolos v. Caldewey*, 698 F.2d 991 (9th Cir.) *cert den.* 381 U.S. 915 (1983), and other intellectual property interests, *Mother Waddles Perpetual Mission, Inc. v. Frazier*, 904 F.Supp. 603, 607-09 (E.D.Mich. 1995)(trademarks), and there has been much confusion about the resolution of this question. Therefore, a grant of *certiorari* review is warranted to establish clear standards for federal jurisdiction in this area of the law.[6]

II. A party which has contracted to license a copyrighted work, breached the contract, and continued to display the work may not be found to have willfully infringed the copyright for purposes of an award of statutory copyright damages, 17 U.S.C. §504(c)(2), because another U.S. Court of Appeals has described the issue of whether such conduct even constitutes infringement as "a complex issue in a 'murky' area."

Section 504 (c)(1) of the Copyright Act, 17 U.S.C.§504(c)(1), provides that an award of statutory copyright damages may be no less than $500 and no more than $20,000 per work infringed in the discretion of the court. Section 504(c)(2) of the Copyright Act, 17 U.S.C. §504(c)(2),

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[6]This question is also pending in the Ninth Circuit in a case involving *petitioner. Columbia Pictures Television, Inc. v. Krypton International Corp., et al.*, Case No. 94-55816. That appeal was argued on November 15, 1995 and is still pending.

provides that upon a finding of willful infringement the court may award statutory damages of up to $100,000 per work infringed. Here, MCA sought statutory damages and alleged that Feltner's infringement was willful. The district court agreed and found that his conduct was willful.

The district court held that Feltner knew that MCA's revocation of the licenses prevented him from lawfully broadcasting the programs and therefore he knew his conduct constituted infringement. However, the evidence was that Feltner had been in the business of licensing motion pictures as a licensor for thirty years, that he understood based on his experience that the mere breach of the agreement does not constitute infringement, and that he based his conduct on this belief He further testified that he conducted his own licensing business in this fashion.

The court below stated that the proper standard to be applied in determining whether an infringer has acted willfully is whether the infringer acted "...with knowledge that (his) conduct constitutes copyright infringement." (App. 4a) When this standard is considered in the light of the Second Circuit's statement in *Schoenberg, supra*, at 931, that:

> The question of whether the breach of a contract licensing or assigning a copyright gives rise to a federal cause of action under the Copyright Act is *a complex issue in a 'murky' area.* (Emphasis added),

it is clear that the Eleventh Circuit viewed this determination in light of its view of the jurisdictional issue. It is also clear that the Second Circuit would have reached a contrary result.

While this Court might ultimately hold that Feltner's conduct constitutes infringement, it is difficult to see how such conduct could lead to a finding of willfulness when the Second and Fifth Circuits have held that the conduct here does

not even constitute copyright infringement.[7] *Certiorari* is appropriate here to determine what the appropriate standard is to support a finding of willfulness.

III. The decision of the Court of Appeals for the Eleventh Circuit that for purposes of statutory damages under the Copyright Act, 17 U.S.C. §504(c)(1), the episodes of a television series constitute separate works conflicts with decisions of other Courts of Appeals.

A. MCA sought separate awards of statutory damages for each episode of each television series alleged to have been infringed. Feltner argued that the episodes were not separate works but were parts of larger works - the series. Both the district court and the Court of Appeals found that each episode was a separate work.

It is undisputed and the Court of Appeals correctly noted that the term "work" is undefined in the Copyright Act. The Court of Appeals also noted that the circuits which have considered the issue have generally held that separate copyrights are not distinct works "unless they can live their own copyright life." (App.4a) *Gamma Audio & Video v. Ean-Chea,* 11 F.3d 1106 (1st Cir. 1993); *Walt Disney Co. v. Powell*, 897 F.2d 565 (D.C.Cir. 1990).[8]

Thus, in *Walt Disney*, the court stated, at 569:

> The Act does not define 'work' but explains that 'all parts of a compilation or derivative work constitute one work.' ...Courts and scholars have gone further, however, in

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[7]The Panel appears to have given this issue short shrift because the district court did not assess the enhanced damage award permitted under 17 U.S.C.§ 504(c)(2) for willful infringement. However, the determination of willfulness has other adverse consequences for Feltner.

[8]The Second Circuit in *Twin Peaks Productions, Inc. v. Publications International, Ltd.*, 996 F.2d 1366 (2d Cir. 1993), seemed to apply a literary analysis standard to this question.

> defining 'work' for the purpose of determining damages. The Second Circuit has explained that separate copyrights are not distinct works unless they can 'live their own copyright life.' In the same vein, one of its district courts has determined that where separate copyrights 'have no separate economic value, whatever their artistic value, they must be considered part of [a]...work for purposes of the copyright statute.' Nimmer has similarly stated that 'in order to qualify for a separate minimum award, the work which is the subject of a separate copyright would have to be itself...viable.' (Footnotes and citations omitted)

Similarly, in *Gamma Audio*, the First Circuit stated, at 1116-17:

> The term 'work', is undefined under the Copyright Act. Although the *Twin Peaks* court did not undertake the task of supplying a definition, one court of appeals has posited that "separate copyrights are not distinct works unless they can 'live their own copyright life.'"... The test set forth in *Walt Disney* is a functional one, with the focus on whether each expression (or in our case, television episode) has an independent economic value and is, in itself, viable.

Although the Eleventh Circuit purported to adopt the independent copyright life approach of *Walt Disney* and *Gamma Audio*, it in fact strayed far from the principles of those cases in finding that the individual episodes were separate works.

First, it pointed to the fact that the episodes were separately copyrighted. Aside from the fact that there was no proof of this in the trial record, it is legally irrelevant. For example, section 504(c)(1) of the Copyright Act, 17 U.S.C. §504(c)(1), provides that all parts of a compilation are treated

as one work for purposes of statutory damages. (The definition of "compilation" in 17 U.S.C. §101 provides that a "collective work" is also a compilation.) This is true, of course, even if separate portions of the compilation or collective work are separate works or are separately copyrighted.

Second, the Court of Appeals completely misconstrued the First Circuit's decision in *Gamma Audio*. In *Gamma Audio*, the First Circuit adopted the independent copyright life approach of the District of Columbia Circuit but held that since the television series episodes in question were rented separately by video stores they stood alone from an economic perspective and therefore lived their own copyright life. By contrast, the uncontradicted evidence in this case is that individual episodes of the series in question are never sold or licensed separately. Thus, the Eleventh Circuit's decision, while paying lip service to the independent life standard, adopts the position that, notwithstanding the separate copyright life standard for determining what is a work, an episode of a series is automatically a separate work for purposes of statutory damages; in essence the decision of the court below is contrary to the holdings in *Walt Disney* and *Gamma Audio*. This is an issue of great importance to both broadcasters and syndicators which has arisen in many statutory damage cases, and this Court should grant *certiorari* to resolve this conflict.

B. In response to MCA's request for an award of statutory damages for each episode, Feltner alternatively contended that the series in question were "collective works." Under section 504 (c)(1) of the Copyright Act all parts of a compilation are one work for purposes of statutory damages. Section 101 of the Copyright Act defines the term "compilation" to include a "collective work". A "collective work" is then

defined as "a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole." The question is whether the series in question are collective works subject to only one award of statutory damages.

An anthology, which is one type of collective work, can be either a collection of works on the same subject by different authors or a collection of works on different subjects by one author. Feltner contends that the series here are anthologies because they are a group of related works by one author. In rejecting this claim, the Court of Appeals relied on the Second Circuit's decision in *Twin Peaks Productions, Inc. v. Publications International, Ltd.*, 996 F.2d 1366 (2d Cir. 1993). However, the *Twin Peaks* court did not consider the issue of whether the Twin Peaks series was a collective work. Rather, it considered the issue of whether the episodes were separate works and rejected the independent copyright life test of the First and District of Columbia Circuits. This is an important issue in this industry, and its resolution will affect every copyright statutory damage case involving the television industry. As a result a grant of certiorari is warranted with respect to it.

IV. The decision of the Court of Appeals for the Eleventh Circuit that awarded respondent more than one award of statutory damages per work infringed conflicts with a decision of another U.S. Court of Appeals.

Section 504 (c)(1) of the Copyright Act provides, in pertinent part:

> ...the copyright owner may elect...an award of statutory damages for all infringements involved in the action, *with respect to any one work*...in a sum of not less than $500

> or more than $20,000 as the court considers just. (Emphasis added)

It is clear that a court may not make more than one award of statutory damages per work infringed no matter how many times it has been infringed. *Mason v. Montgomery Data, Inc.*, 967 F.2d 135, 143-144 (5th Cir. 1992). However, in this case, the district court did just that, and the majority of the Court of Appeals affirmed over Judge Bright's strenuous dissent. The majority justified its departure from settled precedent and express statutory language by its interpretation of the joint pretrial stipulation. In that stipulation, the parties agreed that there had been 900 broadcasts of copyrighted materials, but they did not stipulate to the number of works which had been infringed. At trial, no evidence was submitted which showed which motion pictures or series episodes had actually been broadcast, and none could be presented because the district court improperly truncated the trial and relieved MCA of its burden of showing how many works were actually infringed.[9]

In its findings, the district court stated that it could not

> ...discern from the Joint Pretrial Stipulation whether each of the 900 acts of infringement involved a separate work.

(App. 37a) Then after stating that Feltner had not specifically raised this issue in the stipulation or before trial, the district court stated that:

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[9]The district court's failure to give to Feltner notice of the procedure it intended to follow and its subsequent failure to adhere to that procedure by themselves warrant reversal. *Louisiana Power & Light Co. v. United Gas Pipeline Co.*, 456 F.2d 326, 332 (5th Cir. 1971) *reversed on other grounds sub nom., FPC v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972); *Lucas v. Dep't of Corrections*, 66 F.3d 245 (9th Cir. 1995). The dissent criticized the majority for failing to address this flaw in the proceedings. (App. 12a, fn.2)

> "[it] must accept for the basis of its award of statutory damages the parties' stipulation that Feltner was responsible for the unauthorized telecasts of MCA's programs on 900 separate occasions."

(App. 37a). On appeal, the majority also focused on the fact that the parties stipulated that the Krypton stations had broadcast the works in question at least 900 times after the notice of termination was sent and that each act "constitutes a separate act of infringement." (App. 9a) The majority held that by agreeing to this formulation Feltner had failed to preserve for trial the issue of whether there could be more than one award per work. It also held that Feltner presented no evidence at trial that the 900 infringing acts in question involved multiple infringements of the same works.The majority decision is inconsistent with the facts, distorts the meaning of the stipulation, and unjustly finds a waiver of the Copyright Act's protections where none was intended.

In his dissent, Judge Bright addressed each of these issues. First, he noted that the stipulation expressly reserved the issue of "what statutory damages shall be awarded in favor of MCA under §504(c) of the Copyright Act." (App.12a) He also stated that the issue of one award per work was necessarily subsumed in this issue because the amount of the award could not be determined until the number of works infringed was determined.

Second, Judge Bright pointed out that the burden of proof on this issue was on MCA. Feltner had no burden, and if MCA produced no evidence on this issue, it could be awarded only one award of statutory damages since there would be, and in fact was, no proof that more than one work had been infringed. Judge Bright's parting words on this subject also bear repeating:

> In my view, a court should hold a party to the language of the stipulation and nothing more. Feltner stipulated only to 900 telecasts of copyrighted material without MCA's authority, not to 900 *works*. Furthermore, the issues of law raised in the pretrial stipulation concerned the amount of statutory damages to be awarded. The $9,000,000 award is grossly unfair under these circumstances. I dissent and would remand for a proper assessment of statutory damages based on each work shown to be infringed. (Emphasis in original)

Id. In sum this issue warrants *certiorari* review because the majority affirmed a judgment which is contrary to fact, an express provision of the Copyright Act and a decision of the Fifth Circuit. In addition, the majority's holding is detrimental to the efficient administration of justice because when attorneys realize that, as in this case, a misconstruction of a joint pretrial stipulation can result in the loss of legal rights and millions of dollars (more than $3 million here) they will be reluctant to stipulate to anything.

V. The Court of Appeals acted contrary to the requirements of Rule 52 (a) of the Federal Rules of Civil Procedure and decisions of other courts of appeals by not remanding to the district court to explain the basis of its award of $10,000 per infringement.

Section 504(c)(1) limits the amount of the award per work infringed to "a sum of not less than $500 or more than $20,000 as the court considers just." In this case, the District Court made an award of $10,000 per work which is within the range permitted by statute. But, since there were 900 such awards, the total award was $9 million. This is the largest such award ever made. However, while Judge Ryskamp stated that in making a statutory damage award the court must consider the consequences of the infringement and he did find

that MCA did not suffer any loss from the infringement and that Krypton did get some indeterminate amount of revenue, he did not explain the basis of the amount of his award. In particular, he did not explain why in a case where the plaintiff would receive the full measure of contract damages (plus retain the value of the unbroadcast programs) and no distinct harm to the copyright was proved or claimed, it was proper to an award an amount equal to 1800 percent of the amount of the contract claim. Thus, the award was totally random and devoid of any evidentiary basis because, as Judge Ryskamp himself noted, no evidence was presented on the issue of the amount of MCA's loss, if any, or any other relevant factor. This, of course, was the result of Judge Ryskamp's decision to first bifurcate the trial into liability and damage phases and his later refusal to permit the damage phase to go forward.

The important point though is that while his finding can be reviewed only for abuse of discretion, it is impossible to perform any review when there is no evidence on the issue and no explanation to support it. This was an issue which Feltner raised in his briefs before the Court of Appeals, and it is an issue which the Court of Appeals assiduously ignored.

While the issue of the need for findings to support a statutory damages award has not been addressed by any of the other courts of appeals, the standards to be applied in making such an award have been addressed by various district courts and the Second Circuit. These district courts have generally held that in making a statutory damage determination the court should consider the following factors: (1) the amount the copyright owner lost; (2) the amount the infringer saved by infringing; (3) the amount of the infringer's gain from infringing; and (4) whether the infringer acted willfully. *Nik-O-Val Music Co. v. P.O.S. Radio, Inc.*, 665 F. Supp. 826

(N.D.Fla.1987); *Morley Music Co. v. Cafe Continental, Inc.*, 777 F. Supp. 1579 (S.D.Fla. 1991); *Jobete Music v. Media Broadcasting Corp.*, 713 F. Supp. 174 (MDNC 1988). And, in *Warner Bros., Inc. v. Dae Rim Trading,Inc.*, 877 F.2d 1120 (2d Cir. 1989), the court remarked, at 1126:

> Statutory damages are awarded when no actual damages are proven or they are difficult to calculate. *F.W. Woolworth Co. v. Contemporary Artists, Inc.*, 344 U.S. 228, 231, 73 S.Ct. 222, 224, 97 L.Ed. 276 (1952). In making a statutory award, the court may consider the likelihood of profits and losses and may take into account the attitude and conduct of the parties.

Thus, in reaching its result, the court below has issued a decision which *sub silentio* is inconsistent with one by the Second Circuit. If evidence had been taken on these issues, it would have been shown that MCA lost about $500,000 but that it was going to receive approximately this amount from the bankruptcy proceeding, that the stations gained nothing by the infringements, and that the stations lost money whenever they showed the MCA programming.

Further, although the issue of the need for findings in a bench trial has not been addressed in the specific context of copyright statutory damages, Rule 52 (a) of the Federal Rules of Civil Procedure provides in pertinent part that:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specifically and state separately its conclusions of law thereon....

The requirement of Rule 52(a) that trial courts must make findings of fact and conclusions of law in bench trials is mandatory. See, *e.g. H. Prang Trucking Co. v. Local Union No. 469*, 613 F.2d 1235, 1238 (3d Cir. 1980); *Featherstone v. Brash*, 345 F.2d 246, 249-50(10th Cir. 1965); *Louis Vuitton, S.A. v. Lee*, 875 F.2d 584, 587 (7th Cir. 1989). The

failure to make findings and explain the basis for the result is contrary to law and frustrates the ability of an appellate court to perform its functions. This failure of the court below to remand on this issue conflicts with decisions of other circuits, and in view of the increasing number of copyright statutory damage cases being filed, this Court should establish the factors which district courts should consider in making statutory damage awards and remand to the district court to make such findings.

CONCLUSION

This case involves numerous substantive questions which will arise in almost every copyright statutory damage case. The law is unsettled on all of these questions and the circuits have resolved them in differing fashions. This Court should grant the petition for certiorari in order to resolve these questions. Further, since all of the issues raised in this Petition are also pending in another case involving petitioner in the Ninth Circuit,[10] petitioner requests that consideration of this Petition be held in abeyance pending decision by the Ninth Circuit. This would avoid the possibility of different results on the same issues for one party.

Respectfully Submitted,

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[10] *Columbia Pictures Television, Inc., supra.*

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APPENDIX

United States Court of Appeals,
Eleventh Circuit.

No. 95-4424.

MCA TELEVISION LTD.,
a Delaware Corporation, Plaintiff-Appellee,

v.

C. Elvin FELTNER, Jr.
Defendant-Appellant,

J. Clifford Curley, et al., Defendants.

July 26, 1996.

Licensor of syndicated television programs brought copyright infringement action against licensee, alleging licensee continued to broadcast the programs after licensing agreements were terminated. The United States District Court for the Southern District of Florida, No. 93-14213-CIV-EBD, Edward B. Davis, J., entered $9 million judgment in favor of licensor, and licensee appealed. The Court of Appeals, Barkett, Circuit Judge, held that: (1) evidence was sufficient to establish that licensee willfully infringed licensor's copyrights, as required to support award of enhanced statutory damages; (2) each episode of syndicated television series broadcast by licensee after licensing agreement expired, rather than series itself, was a separate "work" for purposes of awarding statutory damages; and (3) whether district court erred in calculating statutory damages by awarding damages for multiple airings of same episode was not properly placed before district court.

Affirmed.

Appeal from the United States District Court
for the Southern District of Florida.

Bright, Senior Circuit Judge, sitting by designation, filed dissenting opinion.

Before COX and BARKETT, Circuit Judges and BRIGHT*, Senior Circuit Judge.

BARKETT, Circuit Judge:

C. Elvin Feltner, Jr., appeals from a $9 million judgment against him in favor of MCA Television following a non-jury copyright infringement trial. Feltner contends that the judgment must be reversed because the district court (1) lacked subject matter jurisdiction, (2) erred in finding that he breached licensing agreements when he failed to pay licensing fees that had become due under those agreements, and, finally (3) erred in calculating damages. We affirm.

Factual Background

MCA owns syndicated television programs and Feltner owns television stations. MCA and Feltner entered into an agreement in which MCA licensed Feltner to show certain programs, such as "Kojak" and "The A-Team." When Feltner failed to pay fees that had become due, MCA suspended his right to televise its programs. Notwithstanding the suspension, Feltner continued to televise the MCA programs. MCA sued Feltner claiming 900 separate acts of copyright infringement; one for each unauthorized program that Feltner aired. The district court found for MCA, awarded $10,000 pursuant to statute for each of the 900 unauthorized programs aired, and entered a $9 million judgment against Feltner.

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*Honorable Myron H. Bright, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

Discussion

[1] Feltner initially asserts that the district court lacked subject matter jurisdiction because this cause did not "arise under" the Copyright Act. 17 U.S.C. § 501 *et seq.* Feltner argues that this case involves a breach of contract claim and that the federal district court therefore did not have jurisdiction. We disagree and find that the court had subject matter jurisdiction over MCA's claim under the Copyright Act. *See Sullivan v. Naturalis*, 5 F.3d 1410, 1413 (11th Cir. 1993).

[2] Feltner next asserts that the district court erred in finding that he breached the licensing agreements when he failed to pay the licensing fees. The licensing agreements provided that, if Feltner failed to pay the licensing fees, MCA could terminate Feltner's right to broadcast MCA programs. Feltner does not dispute that he failed to pay the fees. He argues, rather, that MCA waived its right to terminate the licensing agreements because MCA treated prior termination letters merely as collection letters to induce payment. We conclude that the district court's factual finding that MCA did not waive its right to terminate the licensing agreements was not clearly erroneous.

Finally, Feltner argues that the district court erred in its calculation of damages in various ways, only some of which we find necessary to discuss here. Initially, we reject Feltner's assertion that the district court erred in finding that Feltner acted "willfully" in infringing MCA's copyright, which resulted in a higher statutory damages determination. Section 504(c)(1) of the Copyright Act, 17 U.S.C. § 504(c), provides that the copyright owner may elect to recover, instead of actual damages and profits, an award of statutory damages "in a sum of not less than $500 or more than $20,000" for each infringement. *See* 17 U.S.C. § 504(c)(1) (1996). Section 504(c)(2) provides for an enhanced damages award if the

infringement was willful and for a reduced award if the infringement was innocent. One commentator has stated that "[i]t seems clear that as here used 'willfully' means with knowledge that the defendant's conduct constitutes copyright infringement." 3 *Nimmer on Copyright* (1990), § 14.04[B], 14-58-60 (emphasis added).

[3] We note that, although the district court found that Feltner's infringements of MCA's copyrights were "willful, not innocent, in nature," the district court awarded damages of $10,000 per airing, an amount which did not require a finding of willfulness. In any event, the district court's finding that Feltner acted willfully was not clearly erroneous. As the court pointed out, Feltner knew that MCA's revocation of his stations' license to air MCA programs prevented him from lawfully broadcasting them. As such, Feltner knew his conduct constituted copyright infringement.

[4] Feltner also argues that the district court erred in calculating damages because it awarded damages for each *episode* broadcast, as opposed to each series, as a separate "work." Although the federal Copyright Act allows for damages based on each "work," *see* 17 U.S.C. § 504(c)(1) (providing that "the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for *all* infringements involved in the action, *with respect to any one work*") (emphasis added), it does not define the term "work."

The circuits that have defined "work" have held that "separate copyrights are not distinct 'works' unless they can 'live their own copyright life.' " *Gamma Audio & Video, Inc., v. Ean-Chea*, 11 F.3d 1106 (1st Cir. 1993); *Robert Stigwood Group, Ltd. v. O'Reilly*, 530 F.2d 1096, 1105 (2nd Cir. 1976); *Walt Disney Co. v. Powell*, 897 F.2d 565, 569 (D.C. Cir. 1990). This test focuses on whether each expression has an

independent economic value and is, in itself, viable. 11 F.3d at 1116, 530 F.2d at 1105, 897 F.2d at 568.

Feltner asserts that the industry practice is to enter contracts for television series, not individual episodes of series, and that no one would purchase and air just one episode of a series. He argues that, for these reasons, an individual episode of a series does not have independent value, is not "commercially viable," and therefore is not a "work" under the test adopted by the First, Second, and D.C. Circuits.

Although we agree with the test adopted by other circuits in defining a "work," we find that Feltner has failed to meet it here. Indeed, in *Gamma*, the First Circuit rejected the same argument Feltner now makes. *Gamma* involved a video rental store, Ean-Chea, that reproduced and rented unauthorized videotape copies. 11 F.3d at 1108. The district court found that Ean-Chea infringed the copyrights of four episodes of a Chinese language television series owned by Gamma. In calculating statutory damages, the district court gave Gamma a single award, concluding that although Ean-Chea had infringed upon the copyrights in four separate episodes of the series, these episodes constituted only one work based in part on the fact that Gamma sells or rents only complete sets of the series to video stores. *Id.* at 1115. The First Circuit reversed, reasoning that

> [a] distributor's decision to sell or rent complete sets of a series to video stores in no way indicates that each episode in the series is unable to stand alone. More significant for present purposes is the fact that (1) viewers who rent the tapes from their local video stores may rent as few or as many tapes as they want, may view one, two, or twenty episodes in a single sitting, and may never watch or rent all of the

> episodes; and (2) each episode in the [ ] series was separately produced.

Id. At 1117.

Similarly, the decision of a distributor of television programs to sell television series as a block, rather than as individual shows, in no way indicates that each episode in a series is unable to stand alone. Each episode was produced independently from the other episodes and each was aired independently from preceding and subsequent episodes. Moreover, each episode, and not each series, was individually copyrighted by MCA.

[5] Along the same lines, we reject Feltner's argument that each episode was part of a "collective work." Section 504(c)(1) provides that "all parts of a compilation ... constitute one work." The Copyright Act defines "compilation" as

> a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitute an original work of authorship. *The term "compilation" includes collective works.*

17 U.S.C. § 101 (emphasis added). A "collective work" is "a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole." *Id.*

Feltner points to a clause in the licensing agreements referring to anthologies and argues that each series at issue here in an anthology. We are not persuaded. In *Twin Peaks Productions, Inc., v. Publications International, Ltd.*, 996 F.2d 1366 (2nd Cir. 1993), the Second Circuit addressed the issue of the appropriate unit for determining statutory copyright

damages. There, Publications International had published a book containing a detailed discussion of the plots of eight episodes of the television show "Twin Peaks." Publications International argued, as Feltner does here, that, although each episode of "Twin Peaks" was individually copyrighted, it constituted a single work under section 504 of the Copyright Act. The Second Circuit rejected this argument, stating that "[t]he author of eight scripts for eight television episodes is not limited to one award of statutory damages just because he or she can continue the plot line from one episode to the next and hold the viewers' interest without furnishing a resolution." *Id.* At 1381 –

Feltner's argument is not as strong as that rejected by the Second Circuit in *Twin Peaks*. Whereas "Twin Peaks" involved a series of eight shows with a plot that linked the shows together into one cohesive story, the programs at issue here – "The A Team" and "Kojak" – are series with individual plots in each episode. Thus, the district court properly awarded damages for each television episode, rather than for each series, broadcast as a separate "work."

[6] Finally, Feltner asserts that the district court erred in calculating damages because it awarded damages for multiple airings of the same episode. He argues that, under the Copyright Act, statutory damages are based on each "work" infringed, rather than each infringement, *see* 17 U.S.C. § 504(c), and that if the same episode is aired three times, only one work has been infringed, not three. MCA responds that Feltner did not properly place this issue before the district court for determination and that, as a result, we cannot reach the merits of the issue. We agree with MCA.

Section 504(c)(1) provides that "the copyright owner may elect ... an award of statutory damages for all infringements involved in the action, *with respect to any one work*...."

(emphasis added). The Fifth Circuit summarized the effect of section 504(c)(1):

> Under this section, the total number of "awards" of statutory damages (each ranging from $500 to $20,000) that a plaintiff may recover in any given action depends on the number of works that are infringed and number individually liable infringers, regardless of the number of infringements of those works. So if a plaintiff proves that one defendant committed five separate infringements of one copyrighted work, that plaintiff is entitled to only one award of statutory damages ranging from $500 to $20,000. And if a plaintiff proves that two different defendants each committed five separate infringements of five different works , the plaintiff is entitled to ten awards, not fifty.

Mason v. Montgomery Data Inc., 967 F.2d 135, 143-44 (5th Cir. 1992); *see also Walt Disney Company v. Powell*, 897 F.2d 565, 569 (D.C. Cir. 1990).

In this case, however, the district court determined that the parties had failed to raise the issue of whether multiple airings of the same episode were included within the 900 broadcasts of MCA programs that Feltner agreed he aired after MCA had withdrawn Feltner's license. The district court concluded that the parties had agreed in the pretrial stipulation that, if Feltner were found liable for copyright infringement, the number of *works* infringed was 900, one for each of the programs Feltner aired after MCA withdrew Feltner's license.

Rule 16.1E of the Local Rule of the Southern District of Florida instructs parties to file a Joint Pretrial Stipulation no later than five days prior to the pretrial conferences. Rule 16.1E provides that "[t]he pretrial stipulation shall contain ... [a] concise statement of issues of law which remain for

determination by the court." Rule 16.1G further provides that "the pretrial stipulation ... will control the course of the trial." We previously have stated that we owe great deference to the trial judge's interpretation and enforcement of pretrial stipulations. *See West Peninsular Title Co. v. Palm Beach County*, 41 F.3d 1490, 1493 (11th Cir. 1995).

In this case, Feltner and MCA agreed in their joint pretrial stipulation that "[e]ach [of Feltner's] telecasts without MCA's authority – totalling at least 900 in number – constitutes a separate act of copyright infringement." In the statement of uncontested facts, the parties agreed that Feltner's stations "continued to telecast MCA's programs after April 13, 1992 [the date MCA withdrew Feltner's license to telecast the programs], on a total of at least 900 separate occasions." In the "statement of issues of law which remain for determination," the parties did not list as a remaining issue whether multiple airings of a single episode of a program infringed one work or multiple works. The parties merely stated generally that "what statutory damages shall be awarded in favor of MCA under § 504(c) of the Copyright Act" remained to be determined. Thus, despite agreeing to the fact that 900 acts of copyright infringement had occurred, nowhere in the pretrial stipulation did Feltner alert the district court to the specific legal issue of whether the 900 infringements might include multiple broadcasts of the same program that did not constitute separate "works" under Section 504(c).

Moreover, Feltner presented no evidence at trial that the 900 "separate act[s] of copyright infringement" he stipulated to in the pretrial stipulation involved less than 900 infringements under Section 504(c) due to multiple airings of the same program. Feltner failed even to raise this issue until his closing argument. As the district judge properly pointed out after announcing his findings, closing argument simply was too late to raise a new legal issue for the first time. *See Fehlhaber v.*

Fehlhaber, 681 F.2d 1015, 1030 (5th Cir. Unit B 1982) ("[A]n argument first raised in a post judgment motion is simply too late.").

In light of the pretrial stipulation in this case, the deference we give a district court in interpreting a pretrial stipulation, and Feltner's failure to offer evidence at trial on the issue, we find that the district court did not err in interpreting the pretrial stipulation as not placing in issue the number of works infringed. Although Feltner now argues on appeal that 900 acts of copyright infringement is not the same as 900 works under section 504(c), the time to raise this issue was in the issues of law section of the pretrial stipulation, or, at the very latest, during his case at trial. Because Feltner failed to raise the issue there, he cannot now raise it here.

Trial courts cannot be expected to try an issue that the parties have not placed before it. Accordingly, the district court did not err in refusing to reopen the case after it had announced its findings to hear evidence on an issue not identified in the pretrial stipulation. Accordingly, the district court's judgment is AFFIRMED.

BRIGHT, Senior Circuit Judge, dissenting:

The district court assessed Feltner $9,000,000 in statutory damages – $10,00 for each of the 900 occasions on which MCA's programming was improperly aired. Because I believed that the district court incorrectly assessed statutory damages for each infringement (including repeat showings) rather than for each work (i.e., individual episode) infringed, I would remand the case to the district court for a correct determination of damages.

The court's opinion correctly observes that the text of section 504(c)(1) of the Copyright Act and the case law interpreting the Act make clear that the statute allows only one award of statutory damages for each *work* infringed. Section 504(c)(1) provides:

> the copyright owner may elect, at any time before final judgement is rendered, to recover, instead of actual damages and profits, *an* award of statutory damages for *all* infringements involved in the action, with respect to any *one* work, ...

17 U.S.C. § 504(c)(1) (emphasis added)[1] *See Mason v. Montgomery Data, Inc.*, 967 F.2d 135, 143-44 (5th Cir. 1992) ("So if a plaintiff proves that *one* defendant committed *five* separate infringements of *one* copyrighted work, that plaintiff is entitled to only one award of statutory damages...."); *Walt Disney Co. v. Powell*, 897 F.2d 565, 569 (D.C. Cir. 1990)

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[1] The legislative history of section 504 provides:

> A single infringer of a single work is liable for a single amount ..., no matter how many acts of infringement are involved in the action and regardless of whether the acts were separate, isolated, or occurred in a related series.

H.R. Rep. No. 1476, 94th Cong., 2d Sess., at 162 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5778.

("Both the text of the Copyright Act and its legislative history make clear that statutory damages are to be calculated according to the number of works infringed, not the number of infringements.")

This court, however, finds this established legal standard inapposite because of statements included in the pretrial stipulation. The majority observes that Feltner presented no evidence at trial that the 900 "showings" he stipulated to in the pretrial stipulation amounted to less than 900 "works" due to multiple telecasts of the same program. The majority contends that because Feltner failed to raise this issue until after the close of the evidence, he became estopped from raising the issue in the district court and from asserting error in that regard on appeal.[2] The majority decision represents an erroneous interpretation of the pretrial stipulation, unjustly shifts the burden of establishing damages from the plaintiff to the defendant, and awards the plaintiff damages to which it is not entitled under the law.

First the issue of damages was properly before the district court. One of the remaining issues of law specified by the pretrial stipulation was "what statutory damages shall be awarded in favor of MCA under § 504(c) of the Copyright Act." As developed above, section 504(c) provides for one award of statutory damages per work infringed. The first question subsumed in this issue is thus what constitutes a "work" under the Copyright Act. Although this sub-issue was not specifically raised in the pretrial stipulation, the district

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[2] Feltner argues on appeal that he was surprised by the sudden close of the trial and that the district court erred by denying him the opportunity to present evidence on the issue of damages. Although this claim is not the basis of my dissent, I believe the majority should have addressed this alleged irregularity in the proceedings before summarily stating that Feltner "failed to offer evidence" on the damages issue

court, and indeed this court on appeal, properly addressed it as a necessary aspect of the statutory damages claim. Having resolved this initial question by determining that each episode constituted a work, the inquiry shifted to how many works had been infringed. The district court, however, held that this second sub-issue had not been properly raised. To my mind, there exists no basis for determining that the pretrial stipulation raised the first sub-issue but not the second. Both are subsumed by the issue "what statutory damages shall be awarded in favor of MCA under § 504(c) of the Copyright Act."

Second, the plaintiff, MCA, bears the burden of establishing its right to damages. Once the district court determined that each episode constituted a "work," it was MCA's obligation to establish the number of different episodes improperly aired. MCA did not carry this burden by the pretrial stipulation, and the district court plainly erred in finding otherwise. The pretrial stipulation stated only that there had been 900 unauthorized telecasts. Contrary to the opinion of the court, at no point did the pretrial stipulation state the number of "works" infringed, nor did it provide the number of different episodes involved.[3] Although 900 may have been a convenient

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[3] In fact, what constituted a work was an issue before the district court and indeed before this court on appeal. MCA contended that each episode constituted a work, while Feltner maintained that each television series was a single work. Since the number of different episodes was irrelevant under Feltner's version of the case, he had no reason to develop those facts at trial. Once the district court determined that each episode constituted a work and announced that it would use the 900 infringements established by the pretrial stipulation as the basis of its award, Feltner argued that several of the showings were of the same episodes and thus constituted multiple infringements of a single work. *See* Tr. of Decision at 13-18. The district court held that the argument came too late and refused to accept evidence on the point.

number, it was not the correct number of "works."[4] It was MCA's obligation to establish the number of works infringed. The district court should not have determined MCA's failure to fully develop its damages claim in a manner favorable toMCA and detrimental to the defendant.

In my view, a court should hold a party to the language of the stipulation and nothing more. Feltner stipulated only to 900 telecasts of copyrighted material without MCA's authority, not to 900 *works*. Furthermore, the issues of law raised in the pretrial stipulation concerned the amount of statutory damages to be awarded. The $9,000,000 award is grossly unfair under these circumstances. I dissent and would remand for a proper assessment of statutory damages based on each work shown to be infringed.

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[4] During the hearing at which the district court orally made its judgment, the district court allowed Feltner to put evidence into the record concerning the number of the 900 showings which were repeat broadcasts of the same episodes. Feltner's statements indicated that at least 300 showings were repeats. *See* Tr. of Decision at 15-17. At $10,000 per infringement this amounts to over $3,000,000 in excess damages.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 95-4424

MCA TELEVISION LIMITED, a Delaware Corporation,

Plaintiff-Appellee,

versus

C. ELVIN FELTNER, Jr.,

Defendant-Appellant,

J. CLIFFORD CURLEY, ETAL

Defendants.

On Appeal from the United States District Court for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC (Opinion _____, 11th Cir., 19__, _____F.2d_____).

Before: COX and BARKETT, Circuit Judges and *BRIGHT, Senior Circuit Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc

* Honorable Myron H. Bright, Senior U.S. Circuit Judge for the Eight Circuit, sitting by designation.

(Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

ORD-42

(6/95)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
NORTHERN DIVISION

MCA TELEVISION, LTD., Plaintiff	)	Docket No. 3-14213-CIV-RYSKAMP
	)	
	)	Ft. Pierce, Fl.
v.	)	October 18, 1994
	)	10:30 a.m.
C. ELVIN FELTNER, Defendant.	)	
	)	
----------x		

VOLUME 2
TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE KENNETH L. RYSKAMP

APPEARANCES:

For the Government: CHRISTOPHER K. KAY, ESQ.
MICHAEL BODINE, ESQ.

For the Defendant: H. SCOTT HECKER, ESQ.
PHILIP SCHWARTZ, ESQ.
RICHARD CHAIFETZ, ESQ.

Court Reporter: Richard Greenspan, CSR, RPR, CM, CRR
United States Courthouse
West Palm Beach, FL 33401

THE COURT: Good morning.

At the conclusion of all the evidence and the arguments that have been submitted by counsel, the court has reviewed all of the cases that have been submitted, and I appreciate your help and the good presentation both sides made in focusing on the issues.

Of course, the issues have been somewhat narrowed by Judge Davis' order of last Friday, and out (sic) tthe outset, for the record, I would adopt all of those findings and conclusions. I will not restate any of those. He made certain findings as to undisputed facts for summary judgment. He made some conclusions of law with regard to the necessary showing for copyright infringement. So all of those findings and conclusions are incorporated here.

I have tried to narrow down the issues that remain for the court to determine and I have identified about six issues here and I will deal with them in order.

The first one deals with subject matter jurisdiction of this court. This was raised yesterday by the defendant. It would seem as though in the prior cases it was raised also and ruled upon.

I find that I do not have to spend much time at this point. This is an action for copyright infringement. It's not an action for breach of contract. The plaintiff has clearly elected statutory damages under Section 504 and the court concludes that it does have subject matter jurisdiction.

The second issue is whether the defendant has established his affirmative defense of an oral contract to restructure the debt.

Now, I think it is significant that there are really no exhibits that have established this particular defense. There are

a number of letters going back and forth, and the most that you can glean from these letters is that the plaintiff wanted to be paid and that the defendant wanted more time to pay. There seems to be no effort at a concerted restructuring, a formalized restructuring of the debt. The April 13 letter even left open, and this is the letter that says you have got to stop showing the particular programming, left open a "payment arrangement."

So I find that the plaintiff was probably always willing to work out some reasonable financial arrangement. The defendant never offered a reasonable financial arrangement. The letters from Krypton merely refer to a hope that they might become current in the future. There was no testimony that a deal was agreed to. There was some testimony that the plaintiff would consider such a deal.

Mr. Feltner testified he would not have purchased these stations if there was not an extension agreement. However, he did purchase the stations and there was no extension agreement.

Mr. Dayton did all of the negotiating with the syndicators. The most that Mr. Dayton could say was that the plaintiff "gave him a comfortable feeling" that the debt might be restructured. He also said that he "was led to believe that the debt would be restructured." Dayton denied that Feltner ever stated that he would not purchase the stations without a restructuring of the debt, at least he denied that he said it to Mr. Dayton.

I find it rather incredible that somebody could invest so many millions of dollars in buying stations if the debt were that critical and not have a formalized plan, something that the parties could put their names on and restructure the debt.

It seems to me it's in the best interests of the plaintiff to keep licensing agreements going. That is their bread and butter. That is the way they make their money, and I think they would have been open to doing it, but it was never done.

Mr. Feltner said that prior to the acquisition of the stations, that he talked to everyone about restructuring the debt and that the news was good. That's still a far cry from saying you have got an agreement or a new arrangement.

The contention that these letters were mere collection efforts is really not a defense to this action. Of course these letters were collection efforts. But when the collection efforts failed, the plaintiffs used whatever recourse they had available to them, and that recourse was to terminate the licensing agreement. It's no different from a mortgage holder who continually says your mortgage is in default, please pay, and he may pay and he doesn't foreclose, but finally you get to the end of the line and you say no more extensions, no more demands for payment, I am foreclosing the mortgage. And the letters were pretty clear that is what the plaintiff had in mind and a reasonable person could not construe those letters any differently.

The defendant's sole idea of restructuring the debt was either to pay when he felt like it and not pay and promise payment in the future. When I say he, there was a corporation. He was working through other people, but everybody agreed through Judge Davis' order that he made all the decisions in this regard.

He did testify that he left all of the negotiating to Mr. Dayton, but that he tried to keep himself informed and he would be bound by the decisions that were made as the 100 percent stockholder of the Krypton Corporation.

So the court finds that the defendant has failed in his burden of proving a new oral agreement, and that's even assuming that this oral agreement could supersede the written agreement. The written agreement clearly states that all negotiations have been incorporated in the agreement; that the

written agreement cannot be amended without having it in writing signed by the parties.

The third issue for the court is was the infringement by the defendant wilful. In evaluating the conduct of the parties in this case, the court bears in mind that the defendant was also in the business of licensing artistic works. He was not unfamiliar with the business. He knew exactly how it worked. He knew the value of any of these properties is in the licensing agreements, and he knew that these syndicated programs were essential to his business.

He further knew that he had not paid for this programming. He further knew by the letter, which any reasonable person could construe, that his license had been revoked and that he could not continue to use this material in his broadcasting.

He took a calculated risk in running these programs with the hopes that he would eventually get the money from the advertising revenue and be able to pay off, assuming the plaintiff would accept a later payment.

His statement that he would not stop programming until a court enjoined him to me is a clear indication of a defiant attitude. I can't imagine somebody saying that, looking at the situation and saying well, to get me to stop programming you are going to have to get an injunction.

The issues did not take a rocket scientist to figure out where they were, and the defendant gets a little comfort from the fact that he did not run the program after being enjoined. The question is why did it take an injunction to stop him from running the programs after the letters were received. The court finds that the defendant wilfully infringed on the plaintiff's copyright.

The fourth question that I see presented for the court is what is a work for the purpose of the copyright law. The court

is frank to admit that it has not explored that area before, and the counsel provided some cases that are helpful in resolving this issue.

Of course, the defendant contends that each series such as Rockford Files or Kate and Allie, each series is a work as opposed to each segment in the series. Now, the evidence before the court that's been agreed to is that each segment is copyrighted.

Now, the court has reviewed the cases cited by counsel and it seems to me that the case of Twin Peaks Productions v. Publications International is probably the most instructive. As you all know, this involved the television series Twin Peaks and a book that was written by the defendant Publications International dealing with the plot of that Twin Peaks series.

The court notes, and I quote, "The eight teleplays for Twin Peaks represents a current television genre in which one or more plots continue from one episode to another. The style was popularized by the police series Hill Street Blues and is still in vogue in the lawyer series LA Law. Twin Peaks carried the style to its limit by keeping the point of the basic plot, that is who killed Laura, continuing throughout the first season of the series beyond the eight episodes at issue in this litigation."

Then they say, "Whatever the scope of the Stigwood ruling concerning overlapping copyrights and related components of single musical production might be under the 1976 Act, we think it has no application to separately written teleplays prepared to become episodes of a weekly television series. The author of eight scripts for eight television episodes is not limited to one award of statutory damages just because he or she can continue the plot line from one episode to the next and hold the viewer's interests without furnishing a resolution."

I think that the series that we have talked about here, although they may have a common theme and common character development, come nowhere close to the Twin Peaks or the LA law or the Hill Street Blues type of series where you have that continual carryover of a plot. The character development certainly are repeated, but I think that the Twin Peaks decision clearly resolves the issue for the court.

The court in Twin Peaks then went to talk about it might be a different situation if they had one of John LeClair's Tinker Tailor Soldier Spy or Smiley's People, where you took one work and had six part to it, maybe a production like Roots, which has one theme but several segments, that might be a different situation, but the court went on to say, "In any event, ours is the easy case of infringement of eight separate works that warrants eight statutory awards whether the registrations apply to the teleplays or to the televised episodes." So the court finds that each segment of the series is a work as defined by the copyright law.

The fifth issue is how many infringements have been established. The parties have stipulated that the defendant authorized the use of plaintiff's material on 900 separate occasions. This does not to totally resolve the issue because in the case of Walt Disney v. Powell, which is 897 F.2d 565 at 569 the court said this. "The district court erred in assessing damages based upon six violations mistakenly focusing on the number of infringements rather than the number of works infringed. Both the text of the copyright act and its legislative history make clear that statutory damages are to be calculated according to the number or works infringed and not the number of infringements. 17 U.S.C. Section 504(c)(1) authorizes a judge to award damages 'for all infringements with respect to any one work.' As the House Report on the bill explains, however, only one penalty lies for multiple infringements of one work."

Then referring tothe United States Code, the court says a single infringer of a single work is liable for a single amount, no matter how many acts of infringement are involved in the action and regardless of whether the acts were separate, isolated or occurred in a related series. Moreover, the minimum and maximum amounts are to be multiplied where multiple works are involved in the suit. The same is not true with respect to multiple copyrights or multiple registrations. Then they go on to say the act does not define a work, but explains that all parts of the compilation or derivative work constitute one work.

Now, the court cannot tell from the stipulation whether each infringement, the 900 referred to, involved a separate work. This issue is further complicated by the fact that there are three television stations involved. For example, if each station was running the Rockford Files, and let's say each one ran segment 20 of the Rockford Files, is this one infringement or is it three?

Well, you have got separate corporations that were infringing, but they were under the direction of one person becasue we have one defendant here, so if these stations were parties, the answer might be different from the situation we have here where we have one party. Can he be guilty of three infringements on the same particular segment?

Furthermore, does the defendant (sic) have the burden of proving the separate works infringed or in light of the stipulation does the defendant have carry that (sic) burden?

Columbia Pictures v. Krypton offers no guidance. Apparently in that case this issue was never raised. It seems to me it should have been raised and it seems to me it should have been raised in this particular case also, but it has not been raised and so I go back to the pretrial stipulation where no one says that this is an issue for the court to determine. This is an issue that came up yesterday in argument, but it is certainly not

an issue that I can find framed by the pretrial stipulation. So since the parties did not list this as an issue for the court, the court will accept the stipulation of the parties that there have been 900 infringements and proceed with that as established.

Issue number 6, what is the proper amount of damages to be awarded in this case? Now, the plaintiff has elected statutory damages. He has the right to do so. The statuture gives him the right to do so and so the court is not really concerned about contract damages.

The court has found that there was no innocent infringements. In fact, to the contrary, the court has found that the infringement was a wilful violation. Thus, the range for violation is from $500 to $100,000, obviously quite a considerable range. Apparently Congress wanted to give the courts a broad range to deal with any particular unique situation.

Now, the court has been given very little guidance from the parties as to what would be the proper amount of damages to award in a case like this. Such guidance might be evidence regarding the consequences of this infringement.

It's clear that the infringement has not destroyed the plaintiff's right to future licensing. In other words, it hasn't diminished the right to use these series or films in the future. It certainly has diminished to some extent his right to use it in this market at a given time, but the court is fully aware that many of these movies and many of these series run over and over and over again, so the court has to make some determination of how much diminution of the value of that right has occurred by running it in violation of the copyright.

It's also clear that this violation has not limited the plaintiff's claim to contract damages. The courts seem to be clear, though, that copyright damages are quite unique and

separate from contract damages and that the proper amount of contract damages may not govern the proper amount of copyright damages.

Now, from the defendant's standpoint the defendant was able to sell advertising time for the programming that it illegally aired. The court has had no testimony or any evidence as to the value, average value of advertising received for any particular segment, so there is not much to instruct the court's enlightened conscience in this particular regard. Again, the Congress has left too (sic) the amount of statutory damages to the discretion of the court.

After weighing all of the facts and circumstances in this case, the court has determined that an award of $10,000 per violation would be a proper amount of damage for each infringement. This would result in a judgment in the amount of $9 million.

Now, I'm fully aware of the award made in the Columbia case of some $20,000 per infringement. I guess I can only conclude that Judge Rafeedie's enlightened conscience differes from mine and that's what I think would be a proper award in this case.

I think that attorney's fees should be awarded and costs. The cases that deal with attorney's fees don't make it automatic, but when the plantiff's position is justified, as it has been in this case, really hardly without dispute, and the court has found a wilful violation, I believe attorneys' fees should be awarded, and plaintiff will make application for those fees by affidavits and the defense can respond with their affidavits. I will wait to hear from the parties whether you want to do it by affidavit or you want an evidentiary hearing or what you feel is a proper way to dispose of those issues, both costs and attorney's fees.

I believe that I have dealt with all issues before the court. When I make an oral ruling like this I usually ask the parties are there any other issues you want me to rule upon that I have not ruled upon that you feel a ruling would be necessary?

First the plaintiff. Do you feel there is anything?

MR. KAY: No, your Honor.

THE COURT: Does the defendant feel there is anything?

MR. CHAIEFTZ: Yes, your Honor, I have one issue that your Honor addressed, I am not quite sure that you want me to talk about this, and that was the number of works.

Last night what I did was I sat down with the affidavits that were submitted in the summary judgment motion and went through them to see how many of the 900 were repeats.

THE COURT: That must have been an exciting evening for you.

MR. CHAIFETZ: Your Honor, it was incredible. Some of them were really difficult to do, particularly those involving WNFT –

MR. KAY: Your Honor, if I may just interrupt, if I could. Are we going to now get into an issue that pertains to the number of issues which were the subject of the stipulation that was filed by the parties and which serves as the basis for the court's decision today? I think what I heard today was that the court, based upon the pretail stip filed by the parties acknowledged there were 900 instances of copyright infringement.

MR. CHAIFETZ: I haven't read the stipulation. I have never seen it, your Honor.

THE COURT: Counsel is correct. I am going to allow you to put this on the record because this is – well, you raised

it yesterday. It hadn't been raised before. Frankly, I was at a loss for a while how to deal with it, but in this district we have a local rule that requires pretrial stipulations as to which issues are to be tried.

I noticed that in California that issue wasn't tried either, so I came to the conclusion that the parties had stipulated to 900 infringements.

MR. CHAIFETZ: Actually –

MR. HECKER: I believe we stipulated to 900 showings.

THE COURT: But nobody had made the issue at that point that a multiple showing of one segment, that a copyrighted work constituted only one violation. Nobody had said that. It didn't come out until all the evidence was over and you made your argument, and very effectively, I think, from the case that I read, but I am going to let you put something on the record here, but I do feel that at this point we can't reframe and reshape the pleadings and the issues really after all the evidence is in, but I will let you proffer what you found.

MR. CHAIFETZ: Thank you very much.

The affidavits that were submitted with the summary judgment motion, which is what I was dealing with last night, show that for Amen at WNFT in Jacksonville, there were 262 separate showings. My review of that filing which lists the program numbers, each episode has a separate number, so I just want through comparing it, show that there were 108 episodes that were actually aired, some of them two or three or even four times.

Similarly, Airwolf was shown 223 times. There were 85 episodes shown.

Buck Rogers, 20 episodes were shown and there were 20 different episodes.

THE COURT: You are saying at each station?

MR. CHAIFETZ: No, going station by station right now.

Then there are three movie packages. There is the Universal Miscellaneous, which has 22 showings, but only 14 works; Universal Pictures Debut Network III, which is 11 showings, 8 separate works, and List Of A Lifetime, which had 10 showings and six separate works.

So the affidavit sumbitted by Mr. Kraus showed 548 showings, if you will, and 241 separate works.

At Fort Pierce, it showed for Kojak 90 showings and 83 separate works.

A-Team, 26 showings and 26 works.

I can't even read my writing on these now.

Give Me A Break was six showings and six works.

The Universal Pictures Debut Network III was 16 showings and 11 works.

One think I didn't do was to compare this program with what happened at WNFT. List Of A Lifetime was 10 showings and nine works.

Then in terms of WABM, we have the affidavit of Mr. Weisberger, and I just couldn't make any sense of it whatsoever. I just couldn't come to any conclusions from it.

THE COURT: All right, thank you.

As you indicated, you compiled this after the evidence had closed and after the closing arguments and the case was over pending the court's decision. It seemed to interject a new issue into the case and this gave me some concern, but I felt that since this issue had never been identified by the parties, I would try only the issues that were submitted. In fact, the issue of

what is a work was really not defined as an issue, and I dealt with that, and I think I could properly deal with that even under the stipulation and the facts, but your statment is made for the record and I will stand by my ruling.

I am sure that will give you some fertile territory on appeal to deal with, whether or not the court should be compelled to reopen the case after all of the evidence is in based upon a principle of law not on the pretrial stipulation and only raised in closing argument, but I will stand by my ruling in that regard.

MR CHAIFETZ: Thank you, your Honor.

MR. HECKER: Judge, Mr. Chaifetz in his closing argument did say to the court that under the act, one work, one infringement, no matter how many times –

THE COURT: Where it came up and he cited me the case, I went to look at the case, and he has a valid point there, but it wasn't a part of the pretrial stip, it wasn't part of the evidence, it wasn't part of the evidence.

MR. HECKER: I don't have the stipulate in front of me. I don't know whether I said we stipulated to 900 showings or 900 infringements.

THE COURT: Of course you didn't say infringement, but that's what the court has to determine, how many infringements, and there is no contrary figure. It seems to me that if this were an issue at any time with the parties, that you would have been not working on it the night before the court's ruling, but would have come here armed with detail as to those things.

MR. HECKER: The statute itself, Judge, states that damages shall be awarded per work, not per showing.

THE COURT: I understand your point and I have dealt with it and that will be my ruling.

Is there anything else that we need?

MR. KAY: No, your Honor.

THE COURT: All right, court will be in recess.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 93-14213-CIV-DAVIS-[RYSKAMP]

MCA TELEVISION LIMITED,
a Delaware Corporation

Plaintiff

vs.

C. ELVIN FELTNER, JR.,
J. CLIFFORD CURLEY,
DANIEL S. DAYTON, and
DOES 1 through 5.

Defendants.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW AND OMNIBUS ORDER

THIS case was tried before the Court on October 17, 1994. After considering all of the evidence, the pleadings filed by the parties, the arguments made by counsel and the legal authorities submitted to the Court, the Court makes the following Findings of Fact and Conclusions of Law.

1. The Court adopts the incorporates herein by reference the findings and conclusions contained in the Order on Motions for Summary Judgment entered by Judge Davis on October 14, 1994.

2. There are six issues that remain for the Court's determination in this case. The court will address each of them in turn below.

I. SUBJECT MATTER JURISDICTION

3. At the close of the evidence, the defendant, C. Elvin Feltner, Jr. ("Feltner"), moved to dismiss this case for lack of subject matter jurisdiction. Feltner argued that the claim brought by the plaintiff, MCA TELEVISION LIMITED ("MCA"), was nothing more than a breach of contract action, such that the Court lacked federal question jurisdiction.

4. The Court finds that this is an action for copyright infringement, not for breach of contract. MCA has clearly elected statutory damages under Section 504 of the Copyright Act, and the Court concludes that it does have subject matter jurisdiction over this matter. *See T. B. Harms Co. v. Eliscu*, 339 F.2d 967 (4th (sic) Cir. 1990); *Arthur Young & Co. v. City of Richmond*, 895 F.2d 967 (4th Cir. 1990). Feltner's Motion to dismiss is therefore denied.

II. ORAL AGREEMENT DEFENSE

5. Feltner defends this action on the basis of his claim that MCA orally agreed to restructure of debt owed by the Krypton television station to MCA. Feltner, however, has failed to carry his burden of proof in establishing this defense.

6. First, no exhibits support this defense. None of the exhibits introduced reflect a concerted effort to formally restructure the debt owed under the License Agreements. While MCA was always willing to work out some reasonable financial arrangement, Feltner never offered a reasonable financial arrangement.

7. Further, there was no testimony that a deal to restructure was ever agreed upon by the parties. There certainly was not any deal in place at the time of Feltner's purchase of the stations. The Court finds it rather incredible that someone like Feltner would invest millions of dollars in buying the

stations and not have a formalized plan to restructure the debt in place if the debt were as critical as Feltner testified.

8. The most that Feltner has proved is that prior to the acquisition of the stations, the syndicators, including MCA, indicated a willingness to discuss a possible restructure of the license debt owed by the stations. However, Feltner failed to prove that he and the syndicators reached an agreement or a new arrangement for the restructuring of the debt.

9. Therefore, the Court finds that Feltner has not fulfilled his burden of proving a new oral agreement to restructure the debt. In any event, it is questionable whether any such oral agreement could supersede the written License Agreements. Those License Agreements clearly provide that all negotiations were incorporated in the agreements, and that any amendments to the agreements must be in writing, signed by both parties.

III. WILLFUL COPYRIGHT INFRINGEMENTS

10 The Court next considers whether Feltner's infringements of MCA's copyrights were willful in nature. In evaluating Feltner's conduct, the Court bears in mind that he was also in the business of licensing artistic works, through Krypton International Corporation. Feltner was familiar with the business. Feltner knew that the License Agreements gave tremendous value to these syndicated programs.

11. Feltner knew that the stations had not paid for the MCA programming. Feltner know (sic) or should have known, moreover, that upon receipt of the MCA cease and desist letters dated April 13, 1992 – which any reasonable person could construe – the stations' licenses had been revoked and that he could not continue to broadcast the MCA programs lawfully. Thus, Feltner took a calculated risk in continuing to telecast the MCA programs.

12. Feltner's testimony that he would not stop telecasting the programs until enjoined by a Court is a clear indication of a defiant attitude. His position in this regard is unreasonable and unacceptable. The fact that he did not run the programs after the injunctions were entered does not eliminate Feltner's responsibility for the earlier unauthorized telecasts.

14. The Court finds that Feltner willfully infringed on MCA's copyrights.

IV. INFRINGEMENT OF EACH "WORK"

15. The Court must define what a "work" is for purposes of calculating the statutory copyright damages to be awarded MCA under 17 U.S.C. § 504(c)(1). Feltner contends that each television series constitutes one work, as opposed to each segment in the series. The Court notes, however, that each such segment is separately copyrighted.

16. The most instructive case in this area is *Twin peaks Productions, Inc. v. Publications Int'l. Ltd.*, 996 F.2d 1366 (2d Cir. 1993). In *Twin Peaks*, the Second Circuit reviewed a ruling by the District Court that the defendant had violated eight separate copyrights – one for each teleplay (or segment) of "Twin Peaks" – and that the plaintiff was entitled to an award of statutory damages in the amount of $15,000 per teleplay for a total of $120,000. The Second Circuit's decision in *Twin Peaks* contained the following analysis.

> The eight teleplays for "Twin Peaks" represent a current television genre in which one or more plots continue from one episode to another. The style was popularized by the police series "Hill Street Blues" and is still in vogue in the lawyers series "L.A. Law." "Twin Peaks" carried the style to its limit by keeping the point of the basic plot (who killed Laura?) continuing throughout the first season of the series,

> beyond the eight episodes at issue in this litigation. Whatever the scope of the *Stigwood* ruling concerning "overlapping" copyrights in related components of a single musical production might be under the 1976 Act, we think it has no application to separately written teleplays prepared to become episodes of a weekly television series. The author of eight scripts for eight television episodes is not limited to one award of statutory damages just because he or she can continue the plot line from one episode to the next and hold the viewer's interest without furnishing a resolution . . . [O]urs is the easy case of infringement of eight separate works that warrants eight statutory awards . . .

Id. at 1381.

17. The decision in *Twin Peaks* clearly resolves this issue for the Court. The Court finds that each segment of each television series licensed by MCA is a "work" as defined by the Copyright Act.

V. NUMBER OF INFRINGEMENTS

18. In the parties' Joint Pretrial Stipulation dated September 26, 1994, the parties stipulated that Feltner directed the stations to telecast MCA's program without MCA's authority after April 13, 1992, on 900 separate occasions. In assessing the amount of statutory damages to be awarded MCA, the Court is also mindful of the decision in *Walt Disney Co. v. Powell*, 897 F.2d 565 (D.C. Cir. 1990):

> The district court erred in assessing damages based upon six "violations," mistakenly focusing on the number of infringements rather than on the number of works infringed. Both the text of the Copyright Act and its legislative history made clear that statutory

> damages are to be calculated according to the number of works infringed, not the number of infringements.
>
> 17 U.S.C. § 504(c)(1) authorizes a judge to award damages "for all infringements . . . with respect to any one work." As the House Report on the bill explains, however, only one penalty lies for multiple infringements of one work. . . (Citation and quotation omitted).

Id. At 569.

19. The Court cannot discern from the Joint Pretrial Stipulation whether each of the 900 acts of infringement involved a separate work. This issue is further complicated by the fact that there are three television stations involved, with certain overlapping programs that had been licensed to one or more of them.

20. The number of separate works infringed upon was not raised by Feltner in the Joint Pretrial Stipulation as an issue for the Court to determine. Feltner did not raise this issue at any time before the trial. Additionally, Feltner did not introduce evidence until the day after the close of evidence and just before this Court's ruling herein.

21. The Court must accept as the basis for its award of statutory damages the parties' stipulation that Feltner was responsible for the unauthorized telecasts of MCA's programs on 900 separate occasions.

VI. AMOUNT OF STATUTORY DAMAGES

22. MCA has elected to receive statutory damages pursuant to 17 U.S.C. § 504(c)(1), which it has the right to do. *Cable/Home Communication Corp. v. Network Productions, Inc.*, 902 F.2d 829, 850 (11th Cir. 1990).

23. The Court finds that Feltner's infringements of MCA's copyrights were willful, not innocent, in nature. Therefore, the statutory range for each such willful violation is from $500 to $100,000. 17 U.S.C. § 504(c). The award of damages within this considerable range is left to the discretion of the Court.

24. In assessing the proper amount of damages to award in a case like this, the Court considers the consequences of these infringements by Feltner. First, it is clear that the infringements have not destroyed MCA's ability to license the subject programs in the future. These violations, moreover, have not limited MCA's claims to recover contract damages. However, copyright damages are quite unique and separate from contract damages, and the proper amount of contract damages may not govern or influence the proper amount of copyright damages. *See e.g., Paramount Pictures Corp. v. Metro Program Network, Inc.*, 962 F.2d 775 (8th Cir. 1992).

25. At the same time, the Court recognizes that the stations were able to sell advertising time for the programming that they illegally aired. However, there was no testimony or other evidence introduced as to the value of the advertising received for any particular segment of the programming, so there is not much to instruct the Court in this regard.

26. After weighing all of the facts and circumstances in this case, the Court has determined that an award of $10,000 per violation is the proper amount of damage for each infringement by Feltner. Therefore, MCA is entitled to a judgment in the total amount of $900,000.

27. Due to the willfulness of Feltner's infringements, MCA is also entitled to recover its reasonable attorney's fees and costs pursuant to 17 U.S.C. § 505.

In conclusion, the Court hereby makes the following rulings:

(1) Feltner's Motion for Amendment of the Judgment Order filed on October 28, 1994 is DENIED.

(2) Feltner's Motion for New Trial filed on October 28, 1994 is DENIED.

DONE AND ORDERED in Chambers at West Palm Beach Florida, this 2 day of March, 1995.

KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

Copies provided:

Nathan Nason
Michael Beaudine
Philip Schwartz

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 93-14213-CIV-DAVIS-[RYSKAMP]

MCA TELEVISION LIMITED, a Delaware Corporation

Plaintiff,

vs.

C. ELVIN FELTNER, JR., J. CLIFFORD CURLEY, DANIEL S. DAYTON, and DOES 1 through 5.

Defendants.

ORDER CORRECTING FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS CAUSE came before the Court upon discovery of a clerical error on page eight of the court's Findings of Fact and Conclusions of Law and Omnibus Order executed on March 2, 1995. Please note that paragraph 26 which lists the amount of judgment as $900,000, should read:

> Therefore, MCA is entitled to a judgment in the total amount of $9,000,000.

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 6 day of March, 1995.

KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

copies provided:
Michael Beaudine
Philip Barry Schwartz
Nathan Nason